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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1569

FIBREBOARD CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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No. .....

FIBREBOARD CORPORATION,

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vs.

NATIONAL LABOR RELATIONS BOARD, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Fibreboard Corporation prays by this petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered January 11, 1971.

OPINIONS BELOW

The divided, *per curiam* opinion of the Court of Appeals is not yet reported except at 75 LRRM 2609 and 64 LC ¶ 11,280; this opinion is reproduced in Appendix A to this petition. The Supplemental Decision and Order of the National Labor Relations Board, issued December 15, 1969, and the Trial Examiner's Decision, which was issued May 23, 1968, are reported at 180 NLRB No. 33, and reported in

part at 72 LRRM 1617 and 1969 CCH NLRB ¶ 21,454. Both the decision of the Board and that of the Trial Examiner are reproduced in the Appendix ("A.") printed for the use of the Court below and filed herein by the Clerk of the Court of Appeals.

The proceedings below were concerned with the enforcement of the Board's Supplemental Decision and Order of September 13, 1962, reported at 138 NLRB 550. This Order was enforced by the Court of Appeals for the District of Columbia Circuit on July 3, 1963, in an opinion reported at 116 U.S. App. D.C. 198, 322 F.2d 411. The Court of Appeal's decree of enforcement was affirmed by this Court on December 14, 1964, in an opinion reported at 379 U.S. 203.

JURISDICTIONAL STATEMENT

The opinion of the Court below was handed down on November 18, 1970, and the Court's judgment entered January 11, 1971. A petition for rehearing was timely filed, which was denied by the Court on January 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). The jurisdiction of the Court below and of the National Labor Relations Board rested on 29 U.S.C. Secs. 160(a), (b), (c), and (f).

QUESTIONS PRESENTED FOR REVIEW

1. The National Labor Relations Board imposed upon Petitioner retroactively wage rates to which it had never agreed and to which it had refused to agree. In so doing, did the Board act counter to the prior decision of this Court holding that Petitioner was under no duty to so agree, and did it act in excess of its jurisdiction and power by compelling Petitioner to agree to conditions of employment more burdensome than any which ever prevailed in the industry, including those set forth in the collective bar-

gaining agreement which Petitioner and the Union executed after bargaining pursuant to the Board's original order in this case?

2. The National Labor Relations Board ordered back pay and reinstatement for individuals discharged for cause, without evidence, hearing or findings. In so doing, did the Board exceed its statutory power and violate the plain provisions of Section 10(c) of the Act that no Board order shall require reinstatement or back pay for individuals so discharged?

3. In the enforcement proceedings below the National Labor Relations Board ordered that Petitioner was liable for interest accruing throughout the back pay period on the amounts found to be owing, although the Board's original remedial order herein did not require the payment of such interest. In modifying its original order in such manner, did the Board act in excess of its authority and contrary to the holding of this Court that the Board cannot change the content of a remedial back pay order after the order has received enforcement from a Court?

4. Did the decision of the Court below summarily affirming the order of the Board deny Petitioner its right to be heard respecting the rights reserved to it by the Act, by the Board's original order and by the decision of this Court affirming the Board's original order?

STATUTES

Statutes significantly involved in this case are Sections 8(d) and 10(c), of the National Labor Relations Act (29 U.S. Code Secs. 158(d), 160(c)). The text of these statutes is set forth in Appendix B, with the portions pertinent to this case printed in italics.

STATEMENT OF THE CASE

Effective as of midnight July 31, 1959, Petitioner Fibreboard Corporation (then Fibreboard Paper Products Corporation) terminated the maintenance employees at its plant in Emeryville, California, and turned the maintenance work over to an independent contractor ("Fluor") for the latter to perform pursuant to a contract with the company. A large portion of Petitioner's maintenance personnel were machinists represented by Local 1304 of the United Steelworkers of America (herein "Union"). Pursuant to a timely notice given by the Union, the collective bargaining agreement between Petitioner and the Union terminated at midnight, July 31, 1959 (A. 58).

The Prior Related Proceedings.

The terminations were followed by picketing at the Emeryville plant by Local 1304 and the filing of unfair labor practice charges by that Union. These charges were, in the first instance, dismissed by the Board on the grounds that Petitioner's decision to sublet the work was predicated upon its legitimate concern over the excessive costs of its maintenance operation, not upon any anti-union motive, and therefore there was no requirement that it negotiate with the Union before putting its decision to subcontract into effect. *Fibreboard Paper Products Corporation,* 130 NLRB 1558 (1961).

A year and one-half after the Board's original decision the Board issued a Supplemental Decision and Order wherein it reversed itself and held that Petitioner had violated Section 8(a)(5) of the Act by failing to bargain with the Union prior to subcontracting the work. *Fibreboard Paper Products Corporation,* 138 NLRB 550 (1962). The Board's remedial order required Petitioner to reinstate its

maintenance operation and the employees represented by the Union, with backpay from the date of the Board's Supplemental Decision (September 13, 1962) to the date of the offers of reinstatement, and to bargain collectively with the Union concerning the decision to sublet the maintenance work (*id.* at 555-557).

Subsequently, on petitions for review and the Board's cross-petition for enforcement, the Court of Appeals for the District of Columbia Circuit affirmed and granted enforcement to the Board's order. *East Bay Union of Machinists, Local 1304 v. NLRB,* 116 U.S. App. D.C. 198, 322 F.2d 411 (D.C. Cir. 1963).

Thereafter, on a writ of certiorari granted upon the Petitioner's petition, this Court affirmed the decision of the Court of Appeals enforcing the Board's order. *Fibreboard Corporation v. NLRB,* 379 U.S. 203 (1964). The Court held that a statutory duty to bargain existed and agreed with the Court of Appeals that the Union should "be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly", but held that Petitioner was not bound to accept specific proposals or to make specific concessions. The Court also upheld the Board's authority to restore the *status quo ante* so as to insure meaningful bargaining by ordering a resumption of Petitioner's maintenance operation and reinstatement with back pay.

The Present Proceedings and Their Background.

On January 18, 1965, following this Court's decision, Petitioner made offers of reinstatement to all of the former employees save three who had been convicted of contempt of court for their misconduct during the picketing which had followed Petitioner's letting of the maintenance work.

Petitioner also bargained with the Union and, in July 1965, executed a bargaining contract with the Union pursuant to which the Union's maintenance personnel were retained in Petitioner's employ (A. 647, 660).

On August 17, 1967, the Regional Director issued a back pay specification and thereafter the matter was heard before a Trial Examiner on numerous dates between October 16 and December 15, 1967. This enforcement proceeding was concerned with implementing the Board's remedial order that Petitioner make the terminated employees "whole for any loss of earnings suffered as a result of [Petitioner's] unlawful action in bypassing their bargaining agent . . ." (138 NLRB at 555). On May 23, 1968, the Trial Examiner issued his decision (A.3). On December 15, 1969, the Board handed down its decision in which, in almost every respect, it rejected the Trial Examiner's findings and recommendations (A. 57).

Petitions for review of the Board's Supplemental Decision and Order were filed with the Court below pursuant to 29 U.S.C. Section 160(f) by both Petitioner and the Union and a cross petition for enforcement was filed by the Board. On November 18, 1970, the Court below, with one Judge dissenting, handed down a *per curiam* opinion in which it denied the petitions and granted enforcement to the Board's order.

The Wage Rates Ordered by the Board.

The wage rates the Trial Examiner applied to the back pay claimants for the years encompassed by the back pay period, which were based upon the rates received by employees in Petitioner's employ during this period who did comparable work (ILWU millwrights), were higher than the highest rates paid during these years to machinists.

under any contract the Union had with any other employer in the area (A. 9-14, 646). The rate recommended by the Trial Examiner, which was $3.985 per hour beginning in June 1965 (A. 59, n. 5; A. 559), and the $4.00 rate fixed in July 1965 in the bargaining between Petitioner and the Union (A. 659, 661), also were the equivalent of the highest machinist rate paid in that year by any other employer having a collective bargaining agreement with the Union (A. 646).

The Board rejected the rates determined upon by its Trial Examiner and instead fixed the back pay rates on the basis of the contract between the parties which had expired July 31, 1959 (A. 58-66). The rates which the Board ordered were not those which had been payable under this expired contract, but were predicated upon a series of annual renewals of the contract with substantial wage increases from 1959 to the end of the back pay period in 1965.[1] These were rates which Petitioner refused to pay the ILWU millwrights after July 31, 1959 (A. 541-544) and which it declined to pay to the Union's machinists when bargaining with the Union in 1965 (A. 544-547, 474-479, 481-483). The rates imposed by the Board over the years of the back pay period exceeded by $.58 to $.78 an hour both the rates paid the ILWU millwrights for comparable work and the highest rates received by the Union's machinists in the employ of others, and were $.80 an hour in excess of the rate the parties in fact agreed to when they bar-

1. The wage rates payable under the expired contract and the successive annual or biannual increases the Board ordered for the back pay claimants were based on a formula (called the Pabco formula) which set the machinist's rate at 12½¢ per hour, or one dollar per day less than the prevailing rate paid to millwrights in the construction industry (A. 58-59, 634). The progression of rates paid the construction industry millwrights is stipulated to in the record at A. 580.

gained pursuant to the Board's order in mid-1965 (A. 59, n.5, 580, 646).

The Board did not find that Petitioner would have agreed to the rates which it imposed, but only that there was no *certainty* that Petitioner would not have so agreed. The Board simply decreed that Petitioner, having failed to bargain in 1959, was to be treated as having agreed to the Union's wage demands in that year and in every subsequent year until the end of the back pay period.

The Board's Refusal to Consider Petitioner's Statutory Defense to the Reinstatement Order.

Petitioner did not offer reinstatement to three former employees who had engaged in acts of violence during the picketing which followed the discontinuance of Petitioner's maintenance operation and who, on December 2, 1959, had been adjudged in contempt of court for their activities (A. 661, 668). In the enforcement proceedings below Petitioner contended that, under Section 10(c) of the National Labor Relations Act (29 U.S.C. § 160(c)), these three employees were subject to discharge for cause and hence not entitled to reinstatement or backpay. The Trial Examiner found that the misconduct of two of these employees was sufficiently serious to warrant denying them reinstatement and back pay, and excluded them from his recommended award (A. 39-40).

The Board, reversing the Trial Examiner, declined to consider the Section 10(c) right of the company to refuse reinstatement for cause or to consider the limitation contained in that statute on the Board's power to award reinstatement and back pay to employees discharged for cause. It held that by failing to raise this issue in the original proceedings on the charge that it had unlawfully failed to bargain with the Union, Petitioner had forfeited its right to challenge the Board's power to order reinstatement

in the back pay proceedings (A. 78-84). There was no charge in the original proceedings that Petitioner had violated the Act by not reinstating the employees; those proceedings were limited to a charge that Petitioner had acted in violation of 8(a)(1), (3) and (5) in failing to bargain concerning subcontracting the maintenance work and terminating the employment of its maintenance employees.

Petitioner's reinstatement and back pay liability was created solely by the remedial order fashioned by the Board in 1962, and the definition of Petitioner's obligations under that order came before the Board for the first time in the back pay hearing. The Board nevertheless held that Petitioner was required at the unfair labor practice hearing to anticipate the remedy ultimately ordered by asserting its defense to any future reinstatement or back pay for employees discharged for cause and, for failure to do so, its rights and the limitations on the Board's power under Section 10(c) of the Act were deemed nullified.

The Board's Modification of Its Original Order.

Under the terms of the Board's original unfair labor practice order herein, the back pay liability was to be computed on the basis of net earnings lost for each quarter of the back pay period *Fibreboard Paper Products Corp., supra,* 138 NLRB at 555. As had been its practice for some twenty-seven years, the Board did not include in the order any liability for interest during the back pay period *(ibid.)*. In a decision rendered shortly after its original decision in the instant case, the Board re-examined its prior policy and determined that thenceforth its back pay orders would expressly include a liability for interest accruing on each of the quarterly amounts found owing, commencing with the end of each quarter. *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

In all cases subsequent to its decision in *Isis Plumbing* the Board expressly specified that its back pay orders included interest on the quarterly amounts of back pay found to be owing. However, with regard to remedial orders entered prior to that case, the Board declined to require such interest when determining the back pay liability in supplemental enforcement proceedings for the reason that a liability for this interest had not been imposed by its original order. In the enforcement proceedings below the Board expanded the terms of its original order by imposing a liability for interest throughout the back pay period, without any consideration of its authority to change its order in this manner, and without any explanation as to why it had chosen to impose such a liability in this case when it had never previously done so in numerous identical cases.

THE REASONS FOR GRANTING THE WRIT

I. By Affirming the Board's Order Imposing on Petitioner Wage Rates to Which It Had Refused to Agree Voluntarily, the Court Below Rendered a Decision in Conflict with This Court's Prior Decision Herein, in Conflict with Other Decisions of This Court and in Conflict with the Decisions of Other Circuits; In So Doing the Court Summarily Approved an Order of the Board Which Was Penal in Effect and in Excess of the Board's Powers.

THE CONFLICT WITH THIS COURT'S PRIOR DECISION HEREIN.

The Board's order below, which retroactively imposed upon Petitioner costly wage rates without consideration of whether these rates were likely to have been agreed to had the parties bargained and despite the fact that these same rates were rejected when the parties did bargain, cannot be reconciled with the Board's original order or with the decision of this Court affirming that order. In its prior

decision this Court held that Petitioner was under no obligation to surrender its legitimate economic interests to the Union's demands and that the bargaining duty resting upon it was not a duty to agree to proposals or a duty to make concessions, but, on the contrary, in the language of the Court of Appeals, Petitioner's obligation was to afford the Union "an opportunity to meet management's complaints that its maintenance operation was unduly costly" (379 U.S. at 214). The Board's back pay award and the decision of the Court below enforcing it departed from the original remedial order, as upheld by this Court, for they deprived Petitioner of its lawful right to call a halt to its unrealistic maintenance costs by imposing upon Petitioner, without regard to its unwillingness to agree thereto, that which was the root cause of the excessive costs—exorbitantly high wage rates which were far in excess of those prevailing in other plants in the area (see, A. 543, 555-556).

The effect of the holdings below was to change a remedial order limited to restoring the situation to what it would have been had the bargaining failure not occurred, to one which imposed contractual penalties on Petitioner. The remedy thus imposed was contrary to the conditions prescribed by this Court in approving the Board's order and it is urged that the Court grant certiorari and exercise its supervisory power to the end that the remedy imposed on Petitioner be brought into conformity with this Court's decision.

THE CONFLICT WITH OTHER DECISIONS OF THIS COURT.

The decision of the Court below conflicts with this Court's recent decision in *H. K. Porter Company, Inc. v. NLRB*, 397 U.S. 99 (1970), in which the Court held that it is not within the Board's remedial power to impose contractual

obligations upon a nonconsenting employer, even in that case wherein the employer's refusal was motivated solely by an intent to frustrate agreement. See also, *Tex Tan Welhausen Co. v. NLRB,* 397 U.S. 819 (1970). Although the decision below upholds the Board's authority to create contractual obligations retroactively rather than prospectively, the Court of Appeals offered no explanation for its implicit distinction.

The National Labor Relations Board itself has recently determined that there is no rational basis for distinguishing between the Board's remedial authority to order contractual terms *in futuro* in the absence of agreement, and its authority to impose terms retroactively. *Ex-Cell-O Corp.,* 185 NLRB No. 20, 74 LRRM 1740, 1743 (1970). In so doing, the Board declined to adopt a view expressed by the Court below in prior decisions that a flagrant disregard by an employer of its bargaining obligations may empower the Board to enter a remedial order imposing liabilities predicated upon a determination by the Board as to what the parties *would* have agreed. *Steelworkers v. NLRB,* 430 F.2d 519 (D.C. Cir. 1970); *IUE v. NLRB,* 426 F.2d 1243 (D.C. Cir. 1970). However, not until its instant decision has even the Court below, which traditionally has taken a liberal view towards the Board's remedial powers, held that the Board has the authority to impose contractual terms where the employer has refused to agree to the very terms the Board would impose. In upholding such a power in the Board, the Court sanctioned an order which is contrary to the limits on the Board's authority expressed in the *Porter* case.

It is respectfully urged that a writ issue herein to bring the decision of the Court below into conformity with the decision of this Court in the *Porter* case and to affirm the

rule of law that the Board is without power under the Act to compel an unwilling employer to accept proposals or agree to concessions as a basis for either past liability or future performance.

THE CONFLICT WITH OTHER CIRCUITS.

The decision of the Court below is, further, in direct conflict with the holding of the Second Circuit in *Cooper Thermometer Co. v. NLRB,* 376 F.2d 684 (1967). That Court, in a case involving a change in manufacturing locations, upheld the Board's order to bargain and its order for reinstatement and backpay, relying in part on this Court's prior decision in the instant case. In so doing, however, the Court declined to enforce the Board's order insofar as it required the employer to adhere to the terms of the expired contract pertaining to the old plant. Anticipating the rationale adopted by this Court in its *Porter* decision, the Second Circuit expressed its holding in the following language:

> "Since Cooper violated § 8(a)(5) by refusing to discuss the terms of transfer with the Union, requiring an offer of preferential reinstatement was proper . . . But reinstatement on what basis? . . . We think the reinstatement offer should be on whatever basis emerges from good faith bargaining between Cooper and the Union; recognizing the likelihood that such bargaining will produce little change from the current practices at [the new plant], we believe this would still be a much closer approximation to what bargaining would have yielded at the proper time. A sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of the sort would give insufficient respect to Congress' di-

rection in § 8(d) that the obligation to bargain 'does not compel either party to agree to a proposal or require the making of a concession.'

"Award of back pay to workers who would have transferred to a new plant had there been proper bargaining is also something of a new departure . . . We think the Board is justified in requiring back pay in such cases for workers who would have transferred if proper bargaining had occurred. See Fibreboard Paper Prods. Corp. v. NLRB, supra, 379 U.S. at 215-217, 85 S.Ct. 398, 13 L.Ed. 2d 233. But the question again is back pay at what rate? The Examiner's solution—back pay at the rate provided in the old contract—would make the workers not merely whole but very much more; carrying over the old pay scales is something that Cooper was demonstrably unwilling to do and the Union rather obviously lacked economic power to compel. Yet the function of the Board's remedy is to restore 'the situation, as nearly as possible, to that which would have obtained but for' the illegal action, Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 61 S.Ct. 845, 85 L.Ed. 1271 (1941) . . . Recognizing there can be no ideal solution, we think that in this case back pay also should be based on the results of the bargaining now ordered or, if this has none, on the [new plant] scale." (376 F.2d at 690-691)

The facts in *Cooper Thermometer* and the facts in the instant case are in all material respects the same and present precisely the same question of law, but that question was decided by the Second Circuit in a manner directly opposite to the decision by the Court below. It is respectfully submitted that the intervention of this Court is required to bring uniformity to the decisions of these Circuits.

THE CONFUSION ENGENDERED BY THE DECISION BELOW.

The Board has recently determined that it is precluded by this Court's decision in the *Porter* case from imposing upon even an employer egregiously defying the law a remedy which "operates retroactively to impose financial liability upon an employer flowing from a *presumed* contractual agreement." *Ex-Cell-O Corp., supra,* 74 LRRM at 1743. The Board, in so deciding, declared itself unwilling to follow the inconsistent view expressed in recent decisions of the Court of Appeals for the District of Columbia Circuit. *Steelworkers v. NLRB, supra; IUE v. NLRB, supra.* Thus, it appears that the conflict between Circuits and that between the rule of the *Porter* case and the decision of the Court of Appeals in this case creates confusion in the administration of the Act which requires the intervention of this Court for resolution. The question should be decided whether the Board can exercise its remedial authority retroactively, through either an original order or the imposition of back pay liabilities, in a manner which this Court has held it cannot do prospectively.

II. By Affirming the Board's Action in Refusing to Petitioner the Defense Reserved It Under Section 10(c) of the Act, the Court below Approved an Interpretation of the Board's Remedial Order Which Conflicts with the Limits on the Board's Authority Expressed in the Act, and in So Doing the Court Acted in Conflict with Other Circuits and Sanctioned Such a Departure from the Accepted and Usual Course of Administrative Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Section 10(c) of the National Labor Relations Act contains the following provision:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of

any back pay, if such individual was suspended or discharged for cause." (29 U.S.C. § 160(c); see Appendix B to this Petition).

The foregoing provision in the Act is an express and clearly stated limitation on the power of the Board with respect to the issuance or enforcement of any remedial order. It is as clearly a limitation on the authority of the Board as that expressed in Section 8(d) (29 U.S.C. § 158 (d); Appendix B) that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession," and the latter provision was held in the *Porter* case to be an absolute restriction on the Board's remedial powers.

In its decision herein the Board compelled reinstatement of, and awarded back pay to, employees whom Petitioner had declined to re-employ upon grounds which the Trial Examiner found constituted good cause. The Board set the Examiner's findings aside and held that Petitioner could not assert the restrictions of Section 10(c) by way of defense because Petitioner had not, prior to the fashioning and entry of the Board's remedial order, anticipated its terms and justified in advance its failure to reinstate those whom it had good cause not to reinstate (A. 78-84). The Board thus held itself relieved of the limitation in Section 10(c) because Petitioner had not raised this limitation in the original proceedings which involved no charge that Petitioner had violated the Act by not reinstating the employees and which gave no notice that if reinstatement were found to be an appropriate remedy and ordered by the Board, the order

would not be subject to the statutory restrictions on the Boards remedial authority.[2]

The end result of the Board's laborious reasoning on this point was that it construed its original remedial order to be absolute in terms; it held, with the approval of the Court below, that it had not by that order merely required reinstatement to the extent consistent with its authority to do so under the Act, but had ordered reinstatement even of individuals the Act expressly declares the Board cannot order reinstated. In so doing, the Board nullified the right reserved Petitioner under Section 10(c) to decline reinstatement to those who had engaged in violent misconduct.

The capriciousness of the Board's holding on this issue is reflected in the fact that the Board itself had previously held just the contrary. Thus, in *St. Clair Lime Company*, 136 NLRB 262 (1962), the Board said the following with regard to its reinstatement order:

> "Our Order in this case is not to be construed as requiring reinstatement of those not entitled to it. The Respondent is required to reinstate only such strikers as are lawfully entitled to reinstatement *if and when*

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2. This ruling of the Board was not compelled by the principles of res judicata because the original charges presented no question whether the terminations were based upon or justified by the misconduct, nor did they include any charge that Petitioner had unlawfully failed or refused to reinstate the terminated employees which would bring into issue any misconduct which would obviate the duty to reinstate. See, e.g., *Phillips Mfg. Co.*, 148 NLRB 1420 (1964); *Tidelines Marine Service, Inc.*, 140 NLRB 288 (1962); *NLRB v. Lambert*, 211 F.2d 91 (5th Cir. 1954). The case quoted by the Board as supporting its ruling on this issue, *NLRB v. Mastro Plastics Corp.*, 261 F.2d 147 (2d Cir. 1958), was a case of the latter type, for the original charges included a charge that the employer had unlawfully refused to reinstate the striking employees and the misconduct the employer later sought to assert in defense to the Board's order was known to the employer at the time the original charges were litigated. See, *Mastro Plastics Corp.*, 103 NLRB 511 (1953), enf'd 214 F.2d 462 (2d Cir. 1954).

> they apply for reinstatement. In view of the facts in this case we deem it advisable to defer to the compliance stage of the proceeding herein the opportunity, which the Respondent is entitled to, for the substantiation of its claims regarding the picket line misconduct of strikers who may apply for reinstatement." (136 NLRB 262; emphasis in the original).[3]

The practice of the Board was in accord with this holding, for the Board consistently permitted misconduct to be asserted in enforcement proceedings as a defense to its orders of reinstatement even where that misconduct occurred before the hearing on the unfair labor practice charges, but was not material to the issues framed by the charges. E.g., *J. H. Rutter-Rex Manufacturing Co., Inc.,* 158 NLRB 1414 (1966); *Trinity Valley Iron and Steel Company,* 158 NLRB 890, 923 (1966); *Cone Brothers Contracting Company,* 158 NLRB 186 (1966); *Elmira Machine and Specialty Works, Inc.,* 148 NLRB 1695 (1964); and see, *Tasty Box Lunch Company, Inc.,* 175 NLRB No. 7, 70 LRRM 1516 (1969); *Florence Printing Co.,* 158 NLRB 775 (1966) and 145 NLRB 141 (1963).

In no decision prior to the instant one of the Court below has any Court interpreted a reinstatement order of the Board as requiring reinstatement of those whom the Board lacks the power to reinstate, with the result that the Court's enforcement foreclosed the employer from subsequently asserting its rights under 10(c) in defense to the order. To the contrary, at least two Circuits have expressly held the opposite, *Vapor Blast Shop Workers Assoc. v. Simon,* 305 F.2d 717, 719-720 (7th Cir. 1962); *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 245 F.2d 594, 598 (5th Cir.

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3. The misconduct in this case occurred during a strike which ended prior to the hearing on the unfair labor practice charges (see the related decision reported at 133 NLRB 1301).

1957), and other circuits have rendered holdings on related questions which are in direct conflict with the rationalization employed by the Board in its decision below. *NLRB v. Plastilite Corp.*, 375 F.2d 343, 348 (8th Cir. 1967); *NLRB v. New York Merchandising Co.*, 134 F.2d 949, 952 (2nd Cir. 1943). These decisions cannot be reconciled with the instant ruling of the Board or with the decision of the Court below affirming it; nor can they be reconciled with the Board's previous practice of entertaining the misconduct defense in compliance proceedings notwithstanding the fact that its original reinstatement order had received enforcement from a Court. *J. H. Rutter-Rex Mfg. Co., Inc., supra,* 158 NLRB 1414; *Trinity Valley Iron and Steel Company, supra,* 158 NLRB 890; *Cone Brothers Contracting Company, supra,* 158 NLRB 186; *Florence Printing Co., supra,* 158 NLRB 775.

The Board's order in this regard, which the Court below enforced, serves no affirmative purpose or policy of the Act; to the contrary, it seeks to award reinstatement and back pay to those whom the Act expressly declares are not entitled thereto. The order is without precedence or justification, is in conflict with the law as expressed by other Circuits and contravenes the principle of the *Porter* decision by presuming to compel adherence to a remedy the Board is without statutory authority to impose.

III. In Affirming the Board's Modification of Its Original Order So as to Include a Liability for Interest During the Back Pay Period, the Court Below Rendered a Decision in Direct Conflict With the Decisions of This Court and Sanctioned Such a Departure from the Accepted and Usual Course of Administrative Proceedings as to Call for an Exercise of This Court's Power of Supervision.

In the early years under the Act, this Court considered the question of the Board's authority to change the liability

specified in its orders for back pay and held that once the order has been enforced by a Court the Board is without the authority to determine in proceedings subsequent to that enforcement that the back pay liability should be changed from that required by the original order. *International Union of Mine, Mill and Smelter Workers, et al. v. Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335 (1945). That holding by the Court is still the law, yet, in the enforcement proceedings below, the Board increased Petitioner's back pay liability in a substantial amount by ordering that the amount owing for the back pay period included a liability for interest which concededly had not been required by the Board's original order. This aspect of the Board's order was completely novel, but the Board's decision contains no explanation why the Board imposed such an obligation in this case or why the Board had for the first time determined it had authority to do that which this Court in the above-cited decision said it could not do (see, A. 72). Nor did the Court below find occasion to comment on the Board's action; instead, as with the other issues raised in this Petition, the Court treated the Board's action as so well within its authority as not to require specific consideration by the Court.

At the time of its original order in this case the Board was still adhering to the policy it had followed for some twenty-seven years of not including an obligation for interest for the back pay period in its back pay awards. *See, Fibreboard Paper Products Corporation,* 138 NLRB 550, 555 (1962). After its original order in this case, the Board changed its policy and determined that in the future its back pay awards would include an obligation for such interest. *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The Board thereafter expressly included interest for the

back pay period in its remedial orders,[4] but with regard to those orders entered prior to *Isis Plumbing* which did not include interest, the Board considered that it was without authority in subsequent enforcement proceedings to add to the original liability it had ordered by requiring interest for the back pay period, although it did determine, in *International Union of Operating Engineers,* 151 NLRB 972 (1965), that in cases of this nature it could order that interest would accrue from the date of the enforcement proceedings on the amounts determined to be owing and ordered to be paid in those proceedings. *See, e.g. Ellis and Watts Products, Inc.,* 143 NLRB 1269, 1272 (1963); *M. J. McCarthy Motor Sales Co.,* 147 NLRB 605, 618 (1964), *Rice Lake Creamery Co.,* 151 NLRB 1113, 1116 (1965); *Burnup and Sims, Inc.,* 157 NLRB 366 (1966).[5]

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4. *See, e.g., Ellis and Watts Products, Inc.,* 143 NLRB 1269, 1272 (1963); *M. J. McCarthy Motor Sales Co.,* 147 NLRB 605, 618 (1964).

5. An aberration occurred in this line of cases in *American Compress Warehouse,* 156 NLRB 267 (1965), wherein the trial examiner erroneously included back pay interest in his recommended order although such interest had not been imposed by the Board's original order and the Board, in a brief opinion, adopted the examiner's decision. However, the interest question was not considered by the Board in its decision and that decision marked no change in the Board's prior holdings regarding its inability to assess interest in these cases, as demonstrated by the fact that in every such case which came before the Board after *American Compress* the Board applied the rule enunciated in *Operating Engineers* and did not order interest for the back pay period. *See, e.g., Burnup and Sims, Inc., supra; Cone Brothers Contracting Company,* 158 NLRB 186, 188 (1966); *Trinity Valley Iron and Steel Co.,* 158 NLRB 890, 904 (1966); *J. H. Rutter-Rex Mfg. Co., Inc.,* 158 NLRB 1414, 1425 (1966).

On a subsequent appeal, the Board's implied award of interest for the back pay period in the *American Compress* case was affirmed by the 5th Circuit in a short opinion wherein the Court did not consider this Court's decision in *Eagle-Picher* and confused the question of what the Board *would* have the authority to order as a make-whole remedy with the question of what the Board had *in fact* ordered in the original remedial order it had issued in the case before the Court. *NLRB v. American Compress Warehouse,* 374 F.2d 573 (5th Cir. 1967).

The foregoing was the background in which the Board in the instant case ordered, in one sentence, that Petitioner's liability for the back pay period was not limited to the obligations imposed by the Board's original order, but included a further obligation for interest during the back pay period. If it is true that the Board cannot second-guess its remedial orders once they have been enforced by a Court, as this Court held in *Eagle-Picher,* then this holding of the Board was patently in conflict with what this Court has said are the limits of the Boards powers; yet the Court below permitted the Board's holding to stand without a word of comment. The decision of the Court below summarily affirming the Board's order, in addition to being in conflict with the aforecited ruling of this Court, was also in conflict with the decisions of this Court and those of other Circuits holding that judicial enforcement should be denied where an administrative agency has failed to articulate a reasoned basis for its decision. *Burlington Truck Lines, Inc. v. U.S.,* 371 U.S. 156 (1962); *SEC v. Chenery Corp.,* 318 U.S. 80 (1943); *NLRB v. Groendyke Transport, Inc.,* 372 F.2d 137 (10th Cir. 1967); *Northeast Airlines, Inc. v. C.A.B.,* 331 F.2d 579 (1st Cir. 1964).

IV. The Summary Disposition of the Issues by the Court Below in Effect Denied Petitioner Its Right to an Appellate Review of the Board's Action and Constituted Such a Departure from Accepted Judicial Procedures, and the Requirements of Due Process, as to Call for an Exercise of This Court's Power of Supervision.

A Justice of this Court has recently observed that "the courts of appeals, and not this Court, are the watchdogs of the Board."[6] This statement, though it is undeniably correct as a general proposition, presupposes that the courts of appeals will discharge their responsibility to

6. Douglas, J., dissenting in *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 268 (1969).

ensure that the Board remains faithful to the limits of its authority and protect litigants before the Board from orders which dispense punishment or are otherwise in excess of the Board's powers.

The Board's order herein subjected Petitioner to unprecedented liabilities and obligations, with only superficial treatment from the majority of the Court below, whicl dismissed the entire appeal as not raising issues warranting the Court's consideration. The question presented by the Court's treatment of the instant appeal is not merely whether Petitioner suffered unjustifiable liabilities in this case, but whether the Board may exercise its remedial power without the supervision of the courts of appeals, leaving this Court as the only resort for acts of the Board in excess of its power.

It is submitted that, while the courts of appeals may properly be termed the "watchdogs" of the Board, the action of the Court of Appeal in this case constituted such a departure from the accepted responsibilities of the reviewing courts as to warrant an exercise of this Court's power of supervision.

CONCLUSION

We respectfully submit that this petition for certiorari should be granted.

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